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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE PUBLIC JUSTICE, P.C., AMERICAN ASSOCIATION FOR JUSTICE, AND CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private corporation sued related to its marketing of cigarettes is "acting under [a federal] officer" and "under color of such office" for purposes of removal jurisdiction under 28 U.S.C. § 1442(a)(1), when that corporation does not assert a federal defense based on its active participation in federal law enforcement, and relies solely on the type of federal preemption defense which this Court has held is otherwise insufficient to invoke removal jurisdiction.

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INTEREST OF *AMICI CURIAE*

Public Justice, P.C., the American Association for Justice, and the Consumer Attorneys of California submit this brief as *amici curiae* in support of Petitioners, urging this Court to hold that Respondent Philip Morris Companies, Inc. (hereinafter "Philip Morris") does not assert a federal law defense that can support removal of a case under the "federal officer removal statute," 28 U.S.C. § 1442(a)(1).[1]

Public Justice, P.C. ("Public Justice"), which recently shortened its name from "Trial Lawyers for Public Justice, P.C." is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating in the federal and state courts, Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice has fought federal preemption in numerous state court cases. *See, e.g., Sprietsma v. Mercury Marine*, 197 Ill.2d 112 (2001), *rev'd, Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002). Public Justice is concerned that, if the decision below is upheld, plaintiffs may be deprived of their choice of

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[1] Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

forum in any case involving a federal preemption defense and the federal courts will be overburdened, causing substantial delays in consumers' access to justice.

The American Association for Justice ("AAJ"), known until Dec. 2006 as the Association of Trial Lawyers of America, is a voluntary national bar association. AAJ's approximately 55,000 members practice in state courts throughout the country, primarily representing plaintiffs in personal injury suits, civil rights and employment discrimination cases, and worker injury actions. AAJ's mission includes the protection of the health and safety of all Americans through the development of law and preservation of the right to trial by jury guaranteed by the Constitution. AAJ believes that the ramifications of potentially placing large numbers of state law actions into at times distant federal courts may result in an unwarranted denial of Americans' fundamental right to legal recourse for injury.

The Consumer Attorneys of California is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. The Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of injured consumers in both the courts and the legislature.

The decision below implicates *amici*'s concerns in a number of respects, one of which is the focus of this brief.

Amici often have advocated before this and other courts against expansive assertions of federal preemption doctrines that would prevent consumers and injury victims from vindicating their rights under state law to seek damages and other relief. State courts have long been the primary guardians of these state-law rights, and federal law consistently has been construed to respect the vital role played by state courts. Even where defendants invoke federal preemption, this Court has been steadfast in holding that cases may not be removed from state to federal court based on an asserted federal defense, and that state courts are equally competent to decide these defenses. The decision below upends this settled rule of law by allowing a private corporate defendant to remove a case after merely asserting a possible preemption defense based upon its alleged compliance with federal regulations. *Amici* submit this brief urging reversal.

STATEMENT OF FACTS

In April 2003, Lisa Watson and Loretta Lawson filed a putative class action against Philip Morris, the seller of millions of packs of cigarettes in the state of Arkansas, alleging that Philip Morris had violated the Arkansas Deceptive Trade Practices Act in selling its Marlboro Lights cigarettes in Arkansas (Counts I and II). *See* Ark. Code Ann. §§ 4-88-101, *et seq.* Pet. App. 62a-73a (First Amended Complaint). They brought this case exclusively on behalf of individuals who purchased cigarettes within the state of Arkansas. Pet. App. 68a (First Amended Complaint, ¶ 27). At the time it was filed, there was no basis for Philip Morris to remove this action pursuant to the diversity removal statute, 28

U.S.C. § 1332,[2] so in order to access its preferred federal forum Philip Morris based its removal solely on 28 U.S.C. § 1442(a)(1), the federal officer removal statute. Pet. App.74a-97a (Notice of Removal).

The federal officer removal statute allows a defendant to remove an otherwise unremovable civil or criminal case when the defendant is a United States officer "or any person *acting under that officer,*" so long as he or she is sued "for any act *under color of such office.*" 28 U.S.C. § 1442(a)(1) (emphases supplied). In support of its removal petition, Philip Morris asserted that when it sold its Marlboro Lights cigarettes within the state of Arkansas, it was "acting under" an officer of the U.S. Federal Trade Commission ("FTC") and selling its cigarettes "under color of" the FTC simply because it was subject to a federal regulatory regime that circumscribed when it could sell its privately manufactured products to the general public.

Recognizing that the statute has been held to impose a requirement that the removing federal officer assert a "colorable federal defense" based upon official actions, Philip Morris contended that it would defend the action against it by demonstrating that "Watson's and Lawson's state law claims were preempted by Section

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[2] The recently enacted Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4, amended 28 U.S.C. § 1332 to "confer[] federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds $5,000,000," and thereby "abrogates the rule against aggregating claims." *Exxon Mobil Corp. v. Allapattah Serv's,* 545 U.S. 546, 571 (2005). If filed today, this case would likely be removed by Philip Morris pursuant to 28 U.S.C. § 1332.

Five of the Federal Cigarette Labeling and Advertising Act." *Watson v. Philip Morris Co's, Inc.*, 420 F.3d 852, 862 (8th Cir. 2005). In response, the Eighth Circuit cursorily addressed whether this assertion by Philip Morris fulfilled the requirement of a "federal defense." The Eighth Circuit dispensed with this requirement in a few short sentences by holding that "the threshold is quite low" for a federal defense and, therefore, it had "no hesitation in concluding that Philip Morris in its Notice of Removal, has set forth a colorable federal defense . . ." *Id.* at 863.

SUMMARY OF ARGUMENT

This Court has consistently held that district courts are by design courts of limited jurisdiction. Under the general removal statute, 28 U.S.C. § 1441, Congress, by permitting removal only when a district court has original jurisdiction, has made "the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, this Court has decided that a defendant's assertion of a preemption defense does not create federal jurisdiction when a plaintiff's claims are based, as herein, entirely upon state law. *Id.* at 393.

The decision below turns this longstanding jurisprudence on its head. Instead of keeping the jurisdiction of federal courts limited, the Eighth Circuit drastically expanded that jurisdiction by construing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), to allow a private corporate defendant to remove any case where state-law claims challenge its conduct, so long as that defendant asserts that its compliance with federal

regulations give rise to a "colorable" preemption defense. Given the pervasiveness of federal regulation in the modern economy, upholding this ruling would essentially transform the federal courts into courts of general jurisdiction over private corporate conduct.

The Eighth Circuit's interpretation of 28 U.S.C. § 1442(a)(1) is incorrect. The federal officer removal statute does not overturn the rule that state courts are competent to handle actions based upon state law where private corporate defendants merely assert preemption defenses. By allowing the defense of preemption to fulfill one of the prerequisites for removal under 28 U.S.C. § 1442(a)(1), the Eighth Circuit ignored the fundamental purpose and intent of the statute. As this Court has repeatedly stated, the federal officer removal statute was designed to apply to "cases where federal officers can raise a colorable defense *arising out of their duty to enforce federal law.*" *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (emphasis added). As a result, this Court has limited the type of federal defenses that may support removal to those directly arising out of the active enforcement of federal law, principally immunity defenses. Philip Morris's preemption defense bears no relationship to this statutory purpose. Philip Morris does not and cannot allege that it was engaged in federal law-enforcement when it privately manufactured and sold "light" cigarettes.

Since Philip Morris's preemption defense has nothing to do with the removal statute's purpose of protecting federal officials and those acting under color of their authority to enforce federal law, the decision below should be reversed. Instead, this Court should hold that removal pursuant to 28 U.S.C. § 1442(a)(1) is

limited to those instances where federal immunity defenses are being asserted in response to state prosecutions which may impede the active *enforcement* of federal law by or under the auspices of a federal officer.

ARGUMENT

The Eighth Circuit failed to acknowledge that this Court has discussed applicable federal defenses under 28 U.S.C. § 1442(a)(1) exclusively in the context of cases involving actual federal officers who were asserting official immunity defenses. This Court has never held that a defense other than an asserted immunity defense will support removal under the statute. For the reasons discussed below, this Court should hold that asserted defenses unrelated to the enforcement of federal law do not support removal under the statute.

I. IT IS WELL SETTLED THAT PREEMPTION DEFENSES DO NOT CREATE FEDERAL JURISDICTION UNDER THE GENERAL REMOVAL STATUTE, 28 U.S.C. § 1441

This Court has often reiterated that the district courts of the United States "are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" Exxon-Mobil Corp., 545 U.S. at 552 (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). This rule embodies the "'due regard for the rightful independence of state governments, which should actuate federal courts, [by requiring] that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 18 (2003) (Scalia, J. dissenting) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

Thus, under the general federal removal statute, 28 U.S.C. § 1441(a), unless otherwise provided by Congress, a defendant may only remove a "civil action brought in a State court of which the district courts of the United States have original jurisdiction." Congress's requirement of original jurisdiction means that a question of federal law "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully v. First National Bank*, 299 U.S. 109, 113 (1936). When a federal law defense does not appear on the face of a plaintiff's complaint, that defense cannot create removal jurisdiction. *See, e.g., Caterpillar*, 482 U.S. at 392 ("The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.").

There is no exception made for the assertion of the federal defense of preemption, as the abiding respect for the authority of state courts has long compelled the recognition of state court competence to resolve preemption defenses. *See, e.g., Chik Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court."). Further, even where a defendant asserts "field preemption," alleging that Congress has displaced state law by occupying an entire field of regulation, state courts are still deemed fully competent to patrol the borders of such occupied fields by resolving these defenses. *See, e.g., Caterpillar*, 482 U.S. at 398-99 (holding that state court must decide preemption defense based on field-preemptive statute); *cf. Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 517-19 (1955) (directing party to raise defense in state court). In fact, state courts handle questions of

"preemption" so often that a Lexis/Nexis search of written decisions reveals that the subject of "preemption" was discussed in at least 457 state court cases in 2006, 440 in 2005, and 448 in 2004.

Even the small set of cases involving "complete preemption" do not undermine this rule. In those cases, this Court has held that a "complete preemption" argument will support removal only if Congress has created not just a federal defense to state-law claims but also an exclusive cause of action under federal law. *See, e.g., Beneficial Nat'l Bank*, 539 U.S. at 9-10 (holding that National Bank Act, 12 U.S.C. § 86, creates exclusive cause of action allowing removal of case involving state-law usury claims against national bank); *id.* at 6-8 (describing similar holdings based on provisions in the National Labor Relations Act, 29 U.S.C. § 185, and Employee Retirement Income Security Act, 29 U.S.C. § 1132). Yet, even in those cases, this Court has been careful to distinguish complete preemption from the general rule that preemption *defenses* alone do not support removal. *See, e.g., Beneficial Nat'l Bank*, 539 U.S. at 9 ("The section [12 U.S.C. § 85] would therefore provide the petitioners with a complete federal defense. Such a federal defense, however, would not justify removal.").[3] As this Court concluded in *Caterpillar*:

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[3] *See also Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 272-73 (2d Cir. 2005) ("The complete-preemption doctrine must be distinguished from ordinary preemption, also known as defensive preemption. Many federal statutes - far more than support complete preemption - will support a defendant's argument that because federal law preempts state law, the defendant cannot be held liable under state law. . . . The Supreme Court has left no doubt, however, that a

> [T]he presence of a federal question . . . in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule - that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. . . . [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

482 U.S. at 398-99 (emphasis in original).

It is thus well settled that federal preemption defenses by themselves do not create removal jurisdiction. The only remaining question, then, is whether Congress, in enacting 28 U.S.C. § 1442(a)(1), "otherwise expressly provided," *id.*, that the federal officer removal statute should override this general, well-

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plaintiff's suit does not arise under federal law simply because the defendant may raise the defense of ordinary preemption.") (citations omitted); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995) ("State law claims which fall outside the scope of [ERISA] § 502, even if preempted by § 514(a), are still governed by the well-pleaded complaint rule and, therefore, are not removable under the complete-preemption principles established in *Metropolitan Life* [*Ins. Co. v. Taylor*, 481 U.S. 58- (1987)].").

considered rule. Although 28 U.S.C. § 1442(a)(1) creates a narrow exception to 28 U.S.C. § 1441's "well-pleaded complaint rule," for the reasons that follow it is clear that the federal officer removal statute was never intended to permit removal outside of the context of federal law enforcement.

II. REMOVAL UNDER 28 U.S.C. § 1442(a)(1) SHOULD ONLY BE AVAILABLE WHERE THE ASSERTED FEDERAL DEFENSE INVOLVES PARTICIPATION IN FEDERAL LAW ENFORCEMENT.

A. The Purpose of the Federal Officer Removal Statute Is to Secure a Federal Forum for Parties Engaged in Federal Law Enforcement.

The primary purpose of the federal officer removal statute has always been to prevent states from using their own court systems to interfere with the federal government's enforcement of federal laws. This underlying purpose has been at the heart of every one of this Court's decisions applying the statute for over a century. For instance, in *Tennessee v. Davis*, 100 U.S. 257 (1880), this Court explained:

> [The United States government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess . . ., the operations of the

> general government may at any time be arrested at the will of one of its members.

Id. at 263; *see also International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 85-86 (1991) (official immunity defense "was resolved by examining whether an officer's challenged actions exceeded the powers the sovereign had delegated to him. Determining whether a federal officer had acted *ultra vires* was fraught with difficulty and subject to considerable manipulation.") (citation omitted); *Willingham*, 395 U.S. at 406 (reiterating that the federal interest supporting removal under this act is "the very basic interest in the enforcement of federal law through federal officials").

Further, this Court has consistently held that giving federal courts the right to resolve federal officers' official immunity defenses in response to state-law prosecutions prevents those prosecutions from unfairly hindering federal law enforcement. Thus, although the Eighth Circuit correctly stated that this Court has held that "the Defendant need only raise a colorable federal defense" and that removal should not be frustrated by a "narrow, grudging interpretation," *Watson*, 420 F.3d at 856, 863 (citing *Willingham*, 395 U.S. at 407, and *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)), the court below ignored the fact that this Court has only discussed federal defenses that "aris[e] out of [an officer's] duty to enforce federal law." It is singularly the threat that state prosecution may impede federal law enforcement operations that has undergirded both "the validity of the defense of official immunity tried in a federal court" and this Court's broad statements regarding removal jurisdiction. *Willingham*, 395 U.S. at 407; *Jefferson County*,

527 U.S. at 431 (quoting *Willingham*); *id.* at 447 (Scalia, J. concurring in part and dissenting in part) ("The point is only that the officer should have to identify as the gravamen of the suit an act that was, if not required by, at least closely connected with, the performance of his official functions."); *Mesa v. California*, 489 U.S. 121, 137 (1989) ("Congress' enactment of federal officer removal statutes since 1815 served 'to provide a federal forum for cases where federal officials must raise defenses arising from their official duties.'") (quoting *Willingham*, 395 U.S. at 405)); *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981) ("Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties."). Removal under this statute thus has always been predicated upon a defendant's colorable allegation that he or she was engaged in federal law *enforcement* activity at the time of the alleged conduct upon which suit has been brought.

Indeed, to date every case this Court has decided addressing this statute has involved the assertion of official immunity defenses by actual federal government officials. For example, in *Davis*, 100 U.S. at 260, it was a federal revenue collector who sought removal ("[T]he act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector."); in *Willingham*, 395 U.S. at 409, removal was sought by on-duty federal prison officers ("Petitioners sufficiently put in issue the questions of official justification and immunity[.]"); in *Maryland v. Soper*, 270 U.S. 9, 34 (1926), removal was sought by four prohibition agents and their chauffeur accused of murder ("In invoking the protection of a trial of a state offense in a federal court under § 33, a federal

officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose. The defense he is to make is that of his immunity from punishment by the state, because what he did was justified by his duty under the federal law . . ."); and in *Colorado v. Symes*, 286 U.S. 510, 518 (1932), removal was sought by a prohibition agent accused of murder ("Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law."). In each of these cases, the defendant(s) argued that the lack of a federal venue in which to present their immunity defense could potentially result in dire consequences for them.

By contrast, Philip Morris makes no claim that it needs to be protected from adverse consequences if its defense is scrutinized within a state court system. Rather than arguing immunity based upon participation in federal law enforcement, Philip Morris merely argues that there may be a conflict between state and federal law when it allegedly complied with federal regulations in the process of privately manufacturing its cigarettes and choosing to sell them within the state of Arkansas.[4]

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4 Philip Morris' asserted preemption defense here is a far cry from the federal immunity defenses which have been asserted by private parties where removal under this statute has at times been upheld. *See, e.g., Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427-28 (11th Cir. 1996) (immunity defense by designated airplane inspector of Federal Aviation Administration); *Venezia v. Robinson*, 16 F.3d 209, 211-12 (7th Cir. 1994) (immunity and justification defenses by participant in FBI sting operation); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 484-86 (1st Cir. 1989)

However, such a preemption defense is precisely the type of defense that state courts have repeatedly been deemed more than competent to resolve.

B. In Order to Effectuate the Underlying Purpose of the Federal Officer Removal Statute and Prevent a Massive Expansion of Federal Court Jurisdiction, This Court Should Expressly Limit Removal Jurisdiction Under 28 U.S.C. § 1442(a)(1) to Cases Presenting Defenses Based Upon Participation in Federal Law Enforcement.

By arguing for an expansive inclusion of all federal defenses within the umbrella of the statute, Philip Morris seeks to make this statute the exception that swallows the rule of limited federal court jurisdiction. This Court has long held that statutes addressing removal jurisdiction should be construed narrowly and strictly out of respect for the independence of state courts. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."). Indeed, as explained above, this statute should only be read expansively when federal officers argue they are enforcing federal law as part of their official duties. The Eighth Circuit's contrary conclusion, which allows removal based on any "colorable federal defense," *Watson*, 420 F.3d at 862-863 ("the threshold is quite low"), rests on the absurd

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(defenses by telephone company participating in federal wiretapping investigation). In these cases, the defendants obtaining removal had colorable defenses based on their alleged actual participation in federal law enforcement.

premise that the federal officer removal statute was intended to provide an exclusive federal forum for a defense that a federal officer himself could hardly ever assert! This Court should reject such a plainly overbroad reading of the statute.

Rather, in order to effectuate the statute's underlying purpose of preventing state interference with federal law enforcement, while at the same time preserving the longstanding principle that federal courts are courts of limited jurisdiction, this Court should clarify the types of federal defenses that the statute is intended to protect: namely, those defenses that arise out of a federal officers' law enforcement responsibilities. Such a bright line rule would appropriately preserve the removal statute's underlying purposes while at the same time stemming the recent tide of removals based on asserted compliance with all manner of federal regulatory schemes. *See, e.g., Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 852-53 (S.D. Ill. 2006) (rejecting window-blinds manufacturer's removal based on asserted compliance with Consumer Product Safety Commission regulations); *King v. Provident Bank*, 428 F. Supp. 2d 1226, 1231-32 (M.D. Ala. 2006) (rejecting bank's removal based on asserted compliance with Truth In Lending Act regulations); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 969-70 (N.D. Ind. 2005) (rejecting removal based on medical device manufacturer's asserted compliance with FDA regulations); *In re MTBE Products Liability Litigation*, 342 F. Supp. 2d 147, 158-59 (S.D.N.Y. 2004) (allowing removal based on gasoline additive manufacturer's asserted compliance with EPA directives); *Guckin v. Nagle*, 259 F. Supp. 2d 406, 416-18 (E.D. Pa. 2003) (rejecting medical device manufacturer's

removal based on asserted compliance with FDA regulations).

As the removals in these cases demonstrate, if Philip Morris's preemption defense here can support removal under the federal officer removal statute, then removal to federal court will become the norm in virtually all cases involving state-law claims against companies in regulated industries. There is no support for this massive expansion of federal court jurisdiction in either the text or underlying rationale behind the federal officer removal statute. Decades of this Court's decisions counsel exactly the opposite result, authorizing plaintiffs rather than defendants to determine both the nature of the claims at issue and the forum in which those claims may be heard.

This Court, therefore, should hold that a defendant seeking removal under 28 U.S.C. § 1442(a)(1) must assert a colorable federal immunity defense that is based on its participation in the actual enforcement of federal law. Absent a federal defense that implicates § 1442(a)(1)'s true purpose, the general rule prohibiting removal in the face of a "well-pleaded complaint" should apply.

CONCLUSION

For the reasons stated herein, the Eighth Circuit's decision should be reversed.

Respectfully submitted,

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